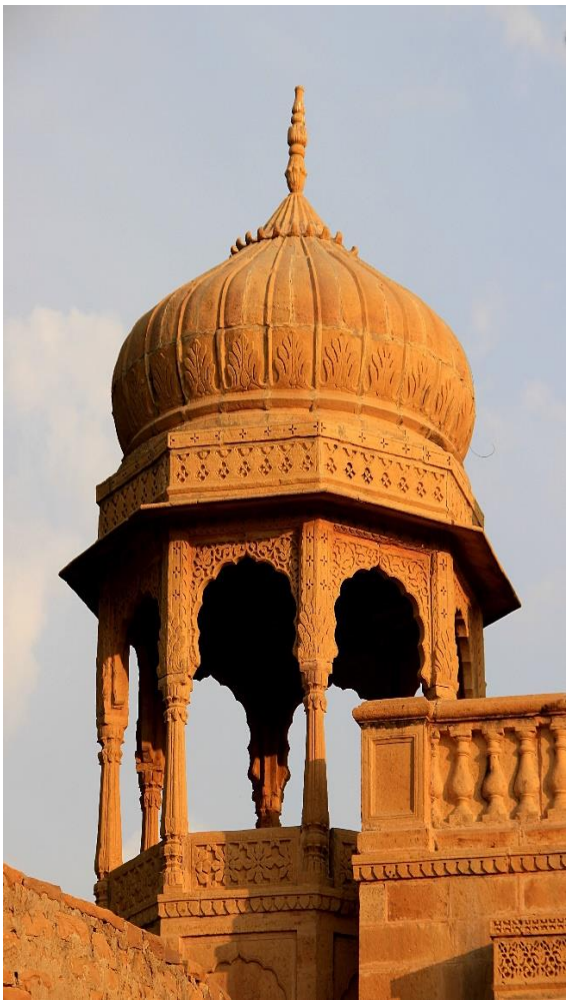
MOHINDER PURI & CO.
CHARTERED ACCOUNTANTS

Corporate Update

November | 2021

CONTENTS



FOREWORD

Dear Reader,

Indian Economy grew at 8.4% in September quarter, coming close to pre-Covid 2019 level benchmark. A few Omicron cases have now been detected in some parts of India and are being closely watched. It is to be seen whether Omicron variant can derail the otherwise big improvement in business activity in India in the last few months.

India and U.S. reached an agreement on a transitional approach, similar to that reached by U.S. with five nations covering Austria, France, Italy, Spain and the UK, on 2% Equalisation Levy as imposed by India, refer a Report on the same.

Faceless tax assessments, appeals, provisions as introduced have been subject matter of challenge by a few taxpayers. A Report on such developments is covered in this Update.

A few changes made in GST tax Rate, Foreign Exchange Management Act Regulations ('FEMA'), as well as reports on certain important judgements on Corporate Tax, form part of this Corporate Update.

C.S. Mathur
Partner

DIRECT TAX

International Taxation

India and USA agree on a transitional approach on Equalisation Levy of 2%

Press Release dated November 24, 2021 by the Ministry of Finance

On October 08, 2021, India and US joined 134 other members of the OECD/G20 Inclusive Framework in reaching agreement on the Two-Pillar approach to address tax issues of digital economy.

Pillar 1 approach seeks to expand taxing rights of market jurisdiction, where large MNEs have a sustained economic participation through digital means. Pillar 2 approach would ensure that highly digitalized business pay at least a minimum level of tax and also that the source country gets additional top up tax rights, where the MNE is not being taxed or taxed at a lower rate than the 'minimum rate' in the treaty partner country.

On October 21, 2021, US and 5 other nations entered into a joint agreement on a transitional approach to existing Unilateral Measures while implementing Pillar 1 ('the Joint Statement'). As part of Pillar 1, Austria, France, Italy, Spain and the UK preferred for withdrawal of Unilateral Measures contingent on implementation of Pillar 1, while the US preferred withdrawal of Unilateral Measures immediately as of October 08, 2021. As per the joint statement, excess taxes that accrue to these 5 nations during the interim period with respect to existing Unilateral Measures as compared to taxes due under Pillar 1 would be creditable against the corporate income tax liability in these countries upon implementation of Pillar 1. The US also agreed to terminate proposed trade actions and commit not to impose further trade actions against the five nations with respect to their existing Digital Services Taxes until the end of the Interim Period.

Recently, India and USA have agreed that the terms of the Joint Statement shall also apply between USA and India with regard to equalisation levy of 2% on e-commerce supply of services. The interim period would commence from April 01, 2022 till implementation of Pillar 1 or March 31, 2024, whichever is earlier. The terms of the Agreement shall be finalised by February 01, 2022.

In view thereof, upon implementation of Pillar 1, India would grant credit of excess taxes that accrue to it during transition period against the taxes due under Pillar 1. By virtue of this understanding, US would also not take any retaliatory trade actions against India.

Ritu Theraja
Deputy Director
Tax Advisory
☏ +91 11 4710 2272
✉ therajaritu@mpco.in

Tribunal allows various adjustments on account of functional, marketing, competition, etc. under CUP method

FDC Limited [TS-573-ITAT-2021(Mum)-TP]

In a recent judgement Mumbai Bench of Tax Tribunal, amongst other issues, allowed adjustment for functional differences, marketing costs, non-variable cost, sales return and competition, while applying Comparable Uncontrolled Price (CUP) method.

On the facts of the case, the assessee is engaged in manufacturing of formulation

(final medicinal products) and Active Pharmaceutical Ingredients. For the relevant year, assessee entered into international transaction of export of finished goods and Interest on loan advanced. The assessee applied Cost Plus Method to benchmark export made to AEs by comparing the percentage margin on cost of sales to AEs vis-à-vis non-AEs. The TPO, however, sought comparison of sale price to AE with sale price to non-AEs for arm's length analysis under CUP. The assessee submitted such comparison by making 8 adjustments to the sale price of non-AEs under CUP method. The TPO rejected 5 out of 8 adjustments and made addition under transfer pricing.

The assessee filed an appeal before CIT(A), amongst other issues, against the addition made by the TPO. The CIT(A) allowed 2 out of 5 adjustments rejected by TPO. Hence, assessee and department both filed appeal before Tax Tribunal.

The Tax Tribunal, in respect of adjustments, held as under:

a) **Functional Difference:** The assessee had borne licence and lab test expenses in relation to non-AE transaction whereas in the AE transaction such expenses were borne by the AE. Thus, in case of export to AEs, the assessee's function was restricted to that of contract manufacturing which was also evident from the technology agreement entered with the AE. In view of the same, the Tribunal held that such adjustments should be allowed to the assessee and upheld the order of CIT(A).

b) **Marketing Costs:** The assessee submitted that since in local markets prescription drugs are sold, the marketing cost is high as compared to exports where the sale is made to fixed distributors. Also, in case of export of AE marketing costs were borne by the AE. The Tax Tribunal held that marketing costs vary with geographical locations and therefore, adjustments for the same was rightly allowed by the CIT(A).

c) **Non- Variable cost:** The assessee has claimed adjustments for overhead costs based on the different pack size. The Tax Tribunal held that the assessee had incurred more overheads in case of domestic sale due to manufacturing from old machineries which consumed more labour hours for packaging and maintenance costs. Therefore, the same is required to be factored while benchmarking the transaction and thus allowed the claim of the assessee.

d) **Sales Return:** The Tax Tribunal observed that in case of AE, once the products are released for sale by designated quality testing facility, the assessee's liability towards any claims, returns, etc. ceases, whereas, in case of non-AE sales, the said liability would be on assessee. Therefore, the same is required to be factored while benchmarking the transaction and thus allowed the claim of the assessee.

e) **Competition:** The assessee submitted that in UK, National Health Service determines reimbursement price of each drug and reimburses the same to retailers. It also submitted its value chain of UK drug market and functions performed by each party in value chain to justify its margins and arm's length price. The Tax Tribunal opined that the competition in two geographical locations would vary due to market conditions and government regulations prevailing in the market. Therefore, the same is required to be factored while benchmarking the transaction and thus allowed the claim of the assessee.

The Tax Tribunal, thus, allowed the adjustments claimed by the assessee in respect of functional difference, marketing cost, non-variable cost, sales return and competition under CUP method for arm's length anaylsis.

Shweta Kapoor
Deputy Director
Tax Advisory
☏ +91 11 4710 2253
✉ shwetakapoor@mpco.in

Domestic Taxation

Faceless Assessment Scheme- path trodden so far

The e-assessment scheme was initially introduced as a pilot project, which was given statutory recognition when the provision for faceless assessment was provided for in the Income-tax Act ("the Act") by the Finance Act, 2018. The objective of faceless assessment was to remove human interface between a taxpayer and income tax department and introducing a team-based assessment with dynamic jurisdiction.

The Central Board of Direct Taxes in October 2019 rolled out the faceless e-assessment scheme (the Scheme) that eliminated physical interface between an assessing officer and an assessee. The Scheme is now part of the Act.

The National Faceless Assessment Centre (NaFAC) is the single point of contact for the taxpayer as well as for all units conducting faceless assessment. The NaFAC issues notices to the assessee for the purpose of assessment. Upon the issue of a notice, the NaFAC allocates the case to any Assessment Unit through an automated allocation system, ensuring anonymity.

Presently, two exceptions are made to the faceless manner of the assessment in the case of: (*i*) assessment orders in cases assigned to Central Charges (Block Assessment Cases u/s 153A/153C) (*ii*) Assessment orders in cases assigned to International Tax Charges.

As against stated objective of the Scheme, the implementation of this Scheme has given rise to a situation where orders are passed in some cases without adhering to the principles of natural justice. The Scheme provides that before passing any adverse order, the NaFAC will issue a show cause notice or a draft order inviting objection of the assessee to the proposed additions/disallowances and if the assessee requires a personal hearing to him or to his authorised representative then such personal hearing is to be granted through video conferencing. However, it has come to light that full and sufficient opportunity is not being granted to the assessees to file their response and granting of personal hearing is at will of the officers who are exercising their powers arbitrarily.

The aggrieved taxpayers are approaching the High Courts challenging the very basis of the assessment as made denying the right to hear to the taxpayers. Taking note of the aforesaid approach of the assessment units under faceless assessment schemes where proper opportunity is not granted to the assessee, the High Courts have passed various judgments on this issue, as under:

1) **Assessee's reply to show cause notice was not considered while passing the final assessment order-** In the case of Mantra Industries Limited v. National Faceless Assessment Centre [TS-962-HC-2021(BOM)], a show cause notice dated April 22, 2021

was issued calling upon the assessee to file its reply within two days i.e. by 23:59 hours on April 24, 2021 (fourth Saturday). The assessee sought adjournment on April 23 and filed its submission dated April 27. Assessment order dated June 08 was issued which was the reproduction of draft assessment order without considering the replies filed by the assessee on April 23 and April 27 stating that the assessee did not give any justification for non-furnishing of details sought in the notice. The Bombay High Court (HC) observed that the affidavit in reply filed by tax department to be contrary as it mentioned that assessee's failure to furnish the details led to assessment u/s 144 (best judgment assessment) whereas same affidavit also stated that the submission dated April 27, 2021 has been taken on record and considered. As such, the HC set aside the faceless assessment order found not in accordance with procedure under section 144B and directed for circulation of its order up to the Revenue Secretary including everybody in the Finance Ministry, and remarked that if such orders are continued then the Court will impose cost on the concerned Assessing Officer.

2) **Despite specific request being made, opportunity of Video Conferencing/ Oral hearing was not provided to assessee** - Where prior to closure/finalization of tax assessment, fair opportunity of Video Conferencing/ Oral hearing had not been provided to assessee, despite specific request being made, the matter was remanded back to Assessing Officer for adjudication afresh by Hon'ble Delhi HC in case of SDS Infratech (P.) Ltd. v. National Faceless Assessment Centre, Delhi [2021] 129 taxmann.com 177 (Delhi)

3) **Quashes faceless assessment order for not providing Video Conferencing password for personal hearing to Assessee-** Calcutta HC quashed faceless assessment order as bad and illegal, and all subsequent actions where despite repeated requests assessee was not provided with the password for personal hearing through video conferencing. HC held that the impugned assessment order was passed in gross violation of principles of natural justice and held it to be untenable in the eyes of law in the Writ petition filed in case of Neeraja Rateria v. National Faceless Assessment Centre [TS-964-HC-2021(CAL)].

4) **Mandatory draft assessment order was not issued to the assessee-** Where assessee's request for personal hearing had been ignored and mandatory draft assessment order had not been issued to assessee, the impugned assessment order and consequential notices for demand and penalty, having been passed without following requirements of Faceless Assessment Scheme, 2019, were treated as non-est and were quashed by the Bombay HC in case of Chander Arjandas Manwani v. National Faceless Assessment Centre [2021] 130 taxmann.com 445 (Bombay)

5) **Noncompliance of procedure specified in section 144B(9) will render the assessment made under Faceless Assessment Scheme non-est**- Where it was not disputed that the draft assessment order proposed variations that are prejudicial to the assessee and it was also not disputed that the draft assessment order was not served on the assessee, the impugned assessment order passed under Faceless Assessment Scheme was

held to be *non-est* and the impugned assessment order and notice of demand were quashed and set aside in a writ petition filed before HC of Bombay in case of Golden Tobacco Ltd. and National Faceless Assessment Centre [2021] 132 taxmann.com 296 (Bombay).

Conclusion

The High Courts have taken serious note of the lapses in the approach of NaFAC in not conforming to the laid down procedure for faceless assessment and have directed to take remedial action and afford opportunity of being heard to the taxpayers. In some cases, it has been directed that the order be circulated up to the Revenue Secretary including everybody in the Finance Ministry and warned that in case such orders are continued to be passed then the Court will be constrained to impose substantial costs on the concerned Assessing Officer to be recovered from his/her salary and also direct the department to place such judicial orders in the career records of such Assessing Officer.

In the context of the faceless assessment scheme, the provisions of the Act specifically require issuance of a show Cause Notice and giving an opportunity of being heard to the assessee where any variation is proposed to the declared income. These embody the basic right of fair hearing to the taxpayer and adherence to principles of natural justice. Denial of opportunity shall vitiate the entire proceedings and, in some cases, it may even result in annulment of the assessment itself.

It is expected that NaFAC shall introduce internal checks to ensure that no final assessment order is passed without prior issuance of a show cause notice as well as draft assessment order and without considering reply by the assessee or a request for personal hearing. This would avoid unnecessary litigation and save cost and time of the taxpayers and only then it can lead to success of the Scheme.

Ankita Mehra
Senior Manager
Tax Advisory
☏ +91 11 4710 2378
✉ ankitamehra@mpco.in

INDIRECT TAX

GOODS AND SERVICES TAX

Changes in Law

CBIC notifies GST rate changes effective from January 01, 2022 in order to correct inverted duty structure in Footwear and Textile Sector.

All footwear, irrespective of prices would now attract Goods & Services Tax (GST) at 12% and all textile products including readymade garments would now have GST at the rate of 12%.

Earlier, Textiles and footwear businesses were unable to claim input-tax credit (ITC) because raw materials were taxed at a higher rate than the finished goods, resulting in the negative impact on the working capital of the businesses. It is because the GST paid at higher rates on raw material is blocked till the government releases refund.

Therefore, in order to overcome this issue, CBIC recently notified new tax rates on footwear and textile.

Summary of comparison of old and revised tax rates are as follows:

A. Change in tax rate of supply of footwear and textiles with effect from January 01, 2022 *(Vide Notification No 14/2021-Central Tax (Rate) dated November 18, 2021):*

- **Footwear (covered under Chapter 64):** GST rate on "footwear of sale value not exceeding INR 1000 per pair" has been increased from 5% to 12%.

  Therefore, now all Footwears, falling under (Chapter 64), irrespective of their sale price, shall be taxable at 12% under GST w.e.f. January 01, 2022.

- **Textiles and apparels:** GST Rates on various textile and apparels, covered under different chapters, have been changed.

  Earlier apparels of sale value not exceeding INR 1000 per piece were taxed @5%. Further, there were different tax rates applicable on different types of textile products.

  With the said amendment effective from January 01, 2022, in brief, all textiles and apparels falling under Chapter 61, 62 and 63, irrespective of their sale price alongwith specific textile covered Chapters 50 to 60, shall be taxable at 12% under GST w.e.f. January 01, 2022. **(Please note that there are certain textiles which would still suffer GST at different rates depending upon their composition.)**

B. Change in Tax Rate on Job work services related to textile and apparel *(Vide Notification No. 15/2021-Central Tax(Rate) dated November 18, 2021):*

Tax Rate on Job work services w.r.t. dyeing or printing of textile and textile products falling under Chapter 50 to 63 in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) has been increased from 5% to 18%.

Note: Reference to Chapters in the above Notifications is to Chapters in the First Schedule to the Customs Tariff Act, 1975.

C. E-Com Operator engaged as restaurant service aggregator would be liable to discharge GST on restaurant services *(Vide Notification No. 17/2021-Central Tax (Rate) dated November 18, 2021):*

Section 9(5) of CGST Act has been amended to provide that Electronic Commerce Operator (E-Com Operator) are required to discharge GST on the intra-state supply of restaurant services, other than the services supplied by restaurant, eating joints etc., located at specified premises w.e.f. January 01, 2022.

In other words, wherein E-Comm Operator are acting in capacity of aggregator of restaurant services (such as Swiggy, Zomato etc.), would be required to discharge GST, instead of Restaurants, on such restaurant services.

Note: The restaurants located in specified premises providing hotel accommodation services having declared tariff of any unit of accommodation above INR 7,500/- per unit per day or equivalent, would not be covered by the above Notification.

In such cases, the liability to discharge GST would continue to be on the restaurants themselves.

Shashank Goel
Director
Indirect Tax
☏ +91 11 4710 2357
✉ shashank.goel@mpco.in

REGULATORY

REGULATORY REVIEW AUTHORITY

Constitution of the Regulatory Review Authority 2.0 by RBI

Reserve Bank of India ("RBI") has established the second Regulatory Review Authority ("RRA 2.0") effective from May 1, 2021 for a period of one year. The objective of RRA 2.0 is to review the regulatory instructions, removing redundant and duplicate instructions, reduce the compliance burden on Regulated Entities by streamlining reporting structure, revoking obsolete instructions and wherever possible obviating paper-based submission of returns.

In order to facilitate the above objectives, RRA 2.0 has been engaging in extensive consultations with both – internal as well as external stakeholders, on review of the regulatory and supervisory instructions for their simplification and ease of implementation. Based on these consultations and the suggestions, the RRA 2.0 has recommended withdrawal of 150 circulars in the first tranche of recommendations.

[Source: Press Release: 2021-2022/1202 dated November 16, 2021 issued by Reserve Bank of India]

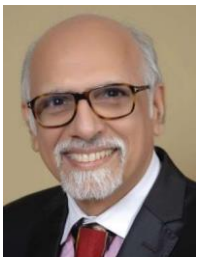
Divya Ashta
Director
Transaction Advisory Services
☏ +91 11 4710 2372
✉ divya@mpco.in

Important dates to remember

Particulars	Date
Goods and Services Tax	
Submission of Form GSTR–1 for November 2021	11.12.2021
Submission of Form GSTR – 3B and due date for payment of tax for November 2021	20.12.2021
Submission of Form GSTR 9 & GSTR 9C	31.12.2021

For further information, please contact:

C. S. Mathur
Partner
☏ +91 11 4710 2200
✉ csm@mpco.in



Vikas Vig
Partner
☏ +91 11 4710 3300
✉ vvig@mpco.in

Surbhi Vig Anand
Partner
☏ +91 11 4710 2250
✉ surbhivig@mpco.in

Mohinder Puri & Co.
New Delhi
1 A-D, Vandhna,
11, Tolstoy Marg,
New Delhi – 110 001

MPC & Co. LLP
New Delhi
Pune
Vadodara

Associates
Ahmedabad
Bangalore
Chennai
Hyderabad
Mumbai

Disclaimer

The contents of this document are for information purposes and general guidance only and do not constitute professional advice. You should not act upon the information contained in this publication without obtaining professional advice.

No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication and Mohinder Puri & Co. disclaims all responsibility for any loss or damage caused by errors/ omissions whether arising from negligence, accident or any other cause to any person acting or refraining from action as a result of any material in this publication.